BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BARBARA K. SHEPARD	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,058,184
BIG LAKES DEVELOPMENTAL CENTER, INC.	)	
Respondent	)	
AND	)	
	)	
UNITED WISCONSIN INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the January 19, 2012 preliminary hearing Order entered by Administrative Law Judge Rebecca Sanders.

RECORD

The Board has adopted the same stipulations as the ALJ, and considered the same record as did the ALJ, consisting of the Transcript of Preliminary Hearing held on January 18, 2012, with the attached exhibits, and the documents filed of record in this matter.

ISSUES

The Administrative Law Judge (ALJ) found that claimant suffered an injury which arose out of and in the course her employment and that claimant was entitled to medical care for her left knee and low back as the result of that July 22, 2011, injury. Respondent was ordered to provide the names of two qualified physicians, from which claimant was to designate an authorized treating physician.

Respondent argues that the Order should be reversed as claimant's back injury is either the result of a preexisting condition or a subsequent intervening event and claimant's left knee injury is the result of a preexisting condition. Therefore claimant did not meet with personal injury by accident arising out of and in the course of her employment and the

incident on July 22, 2011, was not the prevailing factor in causing claimant's need for additional medical treatment for her left knee and low back.

Claimant argues that the ALJ's order should be affirmed.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be reversed.

Claimant testified that she has worked for respondent for approximately ten years. Her job duties before July 22, 2011, were making and passing out coffee, assisting with wheelchair exercises, accompanying patients on outings, serving lunch, and assisting patients using the restroom. Claimant testified that nine years ago she worked in the physical therapy and rehabilitation area, but left because of the work activity.

Claimant claims she injured her left knee and lumbar spine on July 22, 2011, after trying to keep a large gentleman from falling from parallel bars as she was transferring him to a wheelchair. Despite her restrictions of no lifting over 25 pounds, claimant claims she was still asked to work outside of her restrictions.

Claimant testified that after the July 22, 2011 incident, she immediately had some discomfort in her knee. She stated that it was different from her prior knee pain, in that it was like a pulling sensation up her left leg and into her lower back. Claimant filled out an incident report with respondent on Friday July 25, 2011, and again the following Monday.

On August 3, 2011, several days after her injury, claimant was sent to Mercy West to meet with Francis P. Koopman, III, a physician's assistant who, claimant alleged told her she would not be treated because her injury was preexisting. Claimant testified that all Koopman did was twist her knee. No x-rays were taken and the entire visit lasted only 15 minutes. The August 3, 2011 report discusses left knee pain only. There is no mention of a low back injury. The report notes that claimant "denies back pain".[1] It was recommended that claimant meet with her knee doctor, board certified orthopedic surgeon, William T. Jones, M.D.

Claimant admits that she had a prior lumbar spine injury (bulging discs at L4-L5 and L5-S1) related to her work for her previous employer and for which she filed a workers compensation claim and received a $25,000 settlement on August 4, 1992. As a result of that prior lumbar spine injury, claimant had pain that went down into her left knee. Claimant testified that the pain in her lumbar spine and left leg would flare-up once in a while and as part of her settlement she was authorized to treat with the chiropractor, Dr.

[1] P.H. Trans., Resp. Ex. A at 1 (Koopman's Aug. 3, 2011 report).

Blackwood. The record contains office notes from Dr. Blackwood indicating ongoing treatment for claimant's low back for nearly 20 years. However, the treatment provided was sporadic, with claimant going for periods without chiropractic treatment.

Claimant experienced multiple incidents in the past for which Dr. Blackwood provided treatment. In 2000, claimant fell from a horse. In 2003, claimant fell down some stairs, with treatment extending into 2004. In 2005, claimant reported progressively worsening back pain associated with stress and knee pain. In 2006, claimant fell from a ledge and injured her left knee and low back. In 2009, claimant fell down some icy steps. Of particular note are records from July 20 and July 25, 2011. Dr. Blackwood was advised on July 20 that claimant was sitting on a friend's "crappy couch" and experienced low back pain and then was favoring her left knee. When claimant saw Dr. Blackwood on July 25, 2011, she reported that her low back pain worsened over the weekend. No new work-related accident was discussed in that report.

Claimant had been under the care of internal medicine specialist Richard E. Lochamy, M.D. for a significant period of time. On May 19, 2009, she was diagnosed with progressive hip pain and knee pain, with the left lower extremity being the most severe. At that time claimant weighed 284.4 pounds and had been diagnosed with borderline high blood pressure and fatty liver disease. Claimant was cautioned on October 28, 2010, that she was looking at possible bilateral knee replacements in the future. Dr. Lochamy noted that claimant was being treated by Dr. Jones for her knee pain. On September 12, 2011, claimant was examined by Dr. Lochamy for left knee pain and crepitation. There was no mention of low back pain. On September 26, 2011, claimant reported to Dr. Lochamy that she had been experiencing acute low back pain for three days. The report noted that there was no history of trauma.

Claimant had been under the care of Dr. William T. Jones for several years. She initially reported to him, on December 16, 2009, that she had been experiencing left knee symptoms since 2006 or 2007. On December 28, 2009, claimant was diagnosed with chronic left knee pain and patellofemoral arthritis bilaterally. An MRI from December 16, 2009 demonstrated a small joint effusion and articular cartilage changes. On March 4, 2010, claimant was administered a cortisone injection into the knee. Claimant also reported an increase in her knee pain when, on February 11, 2010, she experienced a pop in her knee while walking down stairs. A March 10, 2010, report indicated MRI tests demonstrated degenerative changes without obvious meniscal or ligamentous damage. Surgery was discussed.

On March 25, 2010, claimant underwent surgery on the left knee including arthroscopy with chondroplasty in all compartments, to repair the cartilage damage. The diagnosis included left knee pain with possible meniscal tear. Claimant's knee was injected again on May 5, 2010. Claimant's knee displayed improvement for several months. However, on October 20, 2010, she reported increased pain. A followup MRI was inconclusive, indicating possible osteonecrosis, a less favorable prognosis for which there

is no treatment other than the avoidance of excessive impact loading of the knee joint. A followup cortisone injection was administered on November 17, 2010.

Claimant underwent a second knee surgery with Dr. Jones on December 2, 2010, including an arthroscopy, chondroplasty, partial synovectomy, chondroplasty of the medial femoral condyle and debridement. The January 14, 2011 and February 17, 2011 reports indicated improvement. However, the March 31, 2011 report indicates worsening of the pain after claimant knelt down to administer CPR to a client. Claimant reported numbness in the big toe and second toe on her left lower extremity. An injection was recommended and administered.

The August 8, 2011, report indicates an accident on July 22, 2011, with injury to her left knee while lifting a 250 pound client who had fallen. Claimant reported pain and swelling in the knee. Dr. Jones discussed an aggravation of claimant's preexisting asymptomatic osteoarthritis of the left knee from the July 22, 2011 incident. There is no mention of claimant's low back. A cortisone injection was administered on August 8, 2011. During the followup exam on August 30, 2011, a Synvisc One injection was administered to treat the ongoing pain. No mention of claimant's back was included in the August 30, 2011 report.

At some point not identified in this record, claimant must have complained of low back pain, as an MRI of the lumbar spine was performed on October 18, 2011. The MRI revealed disc desiccation, degenerative disc changes. Mild loss of disc height was noted at several levels of the lumbar spine and a bulging disc was observed at L5-S1. The October 21, 2011 report from Dr. Jones indicates complaints to both the knee and low back from the July 22, 2011 accident. Dr. Jones also discussed claimant's abnormal gait which intensified the low back pain leading to the hospitalization by Dr. Lochamy on July 26, 2011. The low back pain was noted to be decreasing, although not entirely gone. The only low back history discussed was the problem 20 years before. The knee pain was noted to be increasing since the July 22, 2011 incident. An MRI indicated a possible medial meniscal tear. A third surgery was scheduled for November 9, 2011. This third surgery was to repair the torn meniscus. This third surgery proved beneficial as claimant showed improvement by November 18, 2011, to the point that claimant discontinued the use of her cane. Physical therapy was ordered. However, the operative report from November 9, 2011, stated that, while the MRI suggested a tear of the medial meniscus, surgery displayed an intact medial meniscus.

In his November 1, 2011 letter to claimant's attorney, Dr. Jones discussed the injury of July 22, 2011. He noted, with the exception of low back pain many years before, claimant had no low back complaints until the injury of July 22, 2011. He also opined that the new medial meniscal pathology was related to the accident. He acknowledged preexisting articular cartilage damage prior to the July 22, 2011 accident, and reported that claimant was progressing well until the July 22, 2011 incident.

On November 21, 2011, claimant was referred by her attorney to board certified orthopedic surgeon, Edward J. Prostic, M.D., for an examination. Dr. Prostic was advised that claimant suffered an accident on July 22, 2011, with additional trauma through September 23, 2011. The predominant incident was the July 22, accident. Claimant told Dr. Prostic of the accident 20 years before, advising that she did not feel impaired by her low back prior to the 2011 accident. The fact that claimant missed work for two years after that accident was not mentioned. The surgery to her left knee on December 2, 2010, was mentioned, but not the November 9, 2011 surgery. X-rays of the lumbar spine indicated disc degeneration at L5-S1. Dr. Prostic opined that claimant suffered injury to her low back and left knee on or about July 22, 2011, aggravating her pre-existing degenerative disc disease in her low back. He stated that the work injury was the prevailing factor in claimant's need for treatment to the low back and left knee.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[2]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[3]

> If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.[4]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 2011 Supp. 44-501b, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental

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[2] K.S.A. 2011 Supp. 44-501b and K.S.A. 2011 Supp. 44-508(h).

[3] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[4] K.S.A. 2011 Supp. 44-501b(b).

injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[5]

K.S.A. 2011 Supp. 44-508 states in part:

> (d) ''Accident'' means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. ''Accident'' shall in no case be construed to include repetitive trauma in any form.
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> (e) ''Repetitive trauma'' refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. ''Repetitive trauma'' shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.
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> In the case of injury by repetitive trauma, the date of injury shall be the earliest of:
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> (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
>
> (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
>
> (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or
>
> (4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.
>
> In no case shall the date of accident be later than the last date worked.
>
> . . . .
>
> (f)(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
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> (A) An injury by repetitive trauma shall be deemed to arise out of employment only if:
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> (i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
>
> (ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

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[5] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words ''arising out of and in the course of employment'' as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . . .

(g) ''Prevailing'' as it relates to the term ''factor'' means the primary factor, in relation to any other factor. In determining what constitutes the ''prevailing factor'' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) ''Burden of proof'' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.[6]

It is uncontroverted that claimant suffered an accident on July 22, 2011. There is no evidence in this record to dispute her description of the lifting incident with respondent's patient. The question left unanswered is whether this incident resulted in claimant's ongoing need for medical treatment for her left knee and low back. When claimant completed an accident report for respondent, (no date given) she listed only her left knee. At some later time claimant advised her boss Andi Morrison of her back pain. Claimant was told that a second accident report was not necessary. The date of this conversation was not discussed in this record.

When claimant saw Mr. Koopman, the physician's assistant on August 3, 2011, she failed to mention her low back complaints. When claimant saw Dr. Blackwood on July 20 and July 25, 2011 with low back and left knee complaints, she failed to mention a work connection. The July 20, 2011 incident occurred while claimant was sitting on a "crappy couch" at a neighbor's house. The July 25, 2011 entry discusses worsening over the weekend, but with no work connection.

[6] K.S.A.. 2011 Supp. 44-508(d-h).

Claimant's long history of both low back and left knee problems raises another concern. The legislative changes placed into effect on May 15, 2011, now require symptoms at the time of the injury. While claimant's knee symptoms appeared shortly after the accident, the low back symptoms either failed to appear, or have been attributed to a non-work incident. The new law also significantly modifies the effect of an aggravation, acceleration or exacerbation of a pre-existing condition. Claimant's medical history is replete with medical and chiropractic treatment for both her left knee and low back. Dr. Blackwood's chiropractic notes indicate several prior incidents which caused claimant harm. In one instance claimant was off work for two years after a low back injury. She underwent two prior left knee surgeries and was restricted in her work on several occasions.

When claimant reported her knee complaints to Dr. Jones, she initially failed to mention her low back. Dr. Jones reports do not discuss claimant's low back pain until October 2011.

Claimant has provided medical causation opinions from both Dr. Jones and Dr. Prostic. Both appear to have been provided a very limited and incomplete history of claimant's left knee and low back problems. Dr. Prostic was not even advised that claimant underwent left knee surgery on three occasions before his examination, one being only days before his examination. Dr. Jones was advised that claimant had only an episode of low back pain many years before with nothing recent. The ongoing treatment records with Dr. Blackwood were apparently not available to him. Dr. Jones' letter of November 1, 2011, attributes claimant's need for additional left knee treatment to a medial meniscal pathology. However, during surgery, it was discovered that the medial meniscus was intact. No followup opinion from Dr. Jones was sought prior to the preliminary hearing on January 18, 2012. Additionally, while Dr. Prostic discusses an ongoing series of accidents through September 23, 2011, claimant does not provide testimony to support a worsening of her left knee or low back conditions from her work with respondent, apart from the single incident on July 22, 2011.

The new law, placed into effect on May 15, 2011, requires additional elements of proof from a claimant. No longer is the simple aggravation, acceleration or exacerbation of a preexisting condition sufficient. In addition, the accident or repetitive trauma must be the prevailing factor causing the injury. Here, while Dr. Prostic provided the magic words in his report, his medical justification is lacking, in part due to an incomplete medical history on claimant.

This Board Member finds that claimant has failed to satisfy her burden of proving that the accident on July 22, 2011, led to a new injury to claimant's low back or left knee. The order of benefits by the ALJ is reversed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has failed to prove that the incident on July 22, 2011 is the prevailing factor causing claimant's need for medical treatment to her left knee and low back. The award of benefits by the ALJ is reversed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Rebecca Sanders dated January 19, 2012, is reversed.

IT IS SO ORDERED.

Dated this _____ day of April, 2012.

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HONORABLE GARY M. KORTE
BOARD MEMBER

c: Michael L. Snider, Attorney for Claimant
William L. Townsley, III, Attorney for Respondent and its Insurance Carrier
Rebecca Sanders, Administrative Law Judge

[7] K.S.A. 2011 Supp. 44-534a.